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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~117~~ 117

**DORA STEWART LEWIS, MARY WASHINGTON STEWART
BORIE and PAULA BROWNING DENCKLA,**

Petitioners,

**ELIZABETH DONNER HANSON, as Executrix and Trustee under
the Last Will of Dora Browning Donner, Deceased,**

**WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and (2) with William
H. Donner dated March 18, 1932 and March 19, 1932, and (3) with
Dora Browning Donner Dated March 25, 1935,**

**DELAWARE TRUST COMPANY, a Delaware Corporation, as Trustee
Under Three Separate Agreements (1) with William H. Donner Dated
August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, Both
Dated November 26, 1948,**

KATHERINE N. R. DENCKLA,

**ROBERT B. WALLS, ESQUIRE, Guardian Ad Litem for Dorothy
B. R. Stewart and William Donner Denckla,**

**ELWYN L. MIDDLETON, Guardian of the Property of Dorothy B. R.
Stewart, a Mentally Ill Person,**

**EDWIN D. STEEL, JR., ESQUIRE, Guardian Ad Litem for Joseph
Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,**

**BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM V.
MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,**

**LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as Trus-
tee for Benedict H. Hanson, and as Trustee Under Agreements with
William H. Donner,**

**WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENE-
DICT H. HANSON,**

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

ARTHUR G. LOGAN,

LOGAN, MARVEL, BOGGS and THEISEN,
Continental American Building,
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Mary Washington Stewart Borie
and Paula Browning Denckla,
Petitioners.*

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1956.

No.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, De-
ceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and
(2) With William H. Donner Dated March 18, 1932 and
March 19, 1932, and (3) With Dora Browning Donner
Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements (1) With
William H. Donner Dated August 6, 1940, and (2) and
(3) With Elizabeth Donner Hanson, Both Dated No-
vember 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, ESQUIRE, Guardian ad Litem for Dorothy
B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy
B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Cuardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
ner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF DELA-
WARE.**

Petitioners, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware in Appeal No. 8, 1956, entered therein on January 14, 1957, rehearing denied February 7, 1957.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Chancery of the State of Delaware is reported in 119 A. 2d 901 (R. 173),¹ and is printed in the Appendix attached hereto (A. 1a).² The opinion of the Supreme Court of the State of Delaware, printed in Appendix (A. 34a), is reported in 128 A. 2d 819. The opinion of the Supreme Court of the State of Florida, printed in the Appendix hereto (A. 20a) is unreported.

JURISDICTION.

The mandate of the Supreme Court of the State of Delaware was stayed by virtue of its order dated February 7, 1957, to permit petitioners to apply for a writ of certiorari (A. 60a, 61a). Re-hearing was denied on the same date (A. 60a, 61a). Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

1. (R. —) refers to the printed Appendices used in the Supreme Court of the State of Delaware.

2. (A. —) refers to petitioners' Appendix.

QUESTIONS PRESENTED.

1. Does the Full Faith and Credit Clause compel the Courts of the State of Delaware to recognize and give full force and effect to the judgment of the Supreme Court of the State of Florida?

2. Has the Supreme Court of the State of Delaware failed to give full faith and credit to the judgment of the Supreme Court of the State of Florida?

3. Did the Supreme Court of the State of Delaware err in holding the trust agreement valid and enforceable?

SUMMARY OF THE PROCEEDINGS.

This action was brought by Elizabeth Donner Hanson as Executrix and Trustee under the Last Will and Testament of Dora Browning Donner, deceased, for a declaratory judgment in the Court of Chancery of the State of Delaware in and for New Castle County to determine the persons entitled to participate in certain assets held by Wilmington Trust Company, as trustee under a trust agreement between it and the said Dora Browning Donner, executed March 25, 1935, and under certain powers of appointment purportedly exercised pursuant to such trust agreement. All parties in interest were named as defendants in that action (R. 3).

Prior to the institution of the action below a declaratory judgment action was commenced in the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County, by Katherine N. R. Denckla, et al., against the Wilmington Trust Company, Trustee, et al., to determine what assets passed under the Will of the said Dora Browning Donner, who had died a resident of and domiciled in the State of Florida (R. 70). As a necessary incident in deter-

mining what passed under the will of Dora Browning Donner, the Florida Court was obliged to determine whether the trust agreement and the powers of appointment were valid and had been validly exercised. On January 14, 1955, the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County, held by summary final decree that the trust executed March 25, 1935, was invalid because no present interest passed to any beneficiary other than the trustor (testatrix) and further, that the purported exercises of the power of appointment were testamentary and, therefore, invalid because the powers were not properly attested as required by the laws of the State of Florida. The Circuit Court held further that it had no jurisdiction over the non-answering defendants (R. 83-84). On appeal and cross appeal to the Supreme Court of the State of Florida, the decree of the Circuit Court was affirmed as to the invalidity of the trust and the powers of appointment executed thereunder and reversed as to the jurisdiction of the Circuit Court over the non-answering defendants (A. 20a).

In the interim, on January 13, 1956, the Court of Chancery of the State of Delaware in and for New Castle County entered an order upholding the validity of the March 25, 1935, trust and held further that that Court was not bound by the Summary Final Decree in the Florida action and that the distributions made by the trustee were validly made (R. 191). On appeal to the Supreme Court of the State of Delaware, the action of the Delaware Court of Chancery was affirmed, the Delaware Supreme Court holding that it was in no way bound by the decree of the Circuit Court of the State of Florida or the judgment of the Supreme Court of the State of Florida and that the trust and powers of appointment executed in conformity therewith were valid (A. 59a). The Supreme Court of the State of Delaware further noted that this litigation in the Supreme Courts of Delaware and Florida have "become a headlong jurisdictional collision between states" (A. 40a).

HOW THE FEDERAL QUESTION AROSE.

The Full Faith and Credit Clause was urged as being binding by the petitioners in their Delaware answer to the complaint for declaratory judgment and in the counter-claims and cross-claims filed therewith (R. 63). It was again urged upon the Delaware Court of Chancery in petitioners' Motion For New Trial filed on January 20, 1956 (R. 199). It was also the subject of the opinion of the Supreme Court of the State of Delaware (A. 34a). It was specifically rejected by both Courts (A. 11a, 12a, 59a).

CONSTITUTIONAL PROVISION INVOLVED.

The petition involves the meaning and effect of Article IV, Section 1, United States Constitution (the Full Faith and Credit Clause).

STATEMENT OF THE CASE.

Dora Browning Donner died on November 20, 1952, a citizen, resident of, and domiciled in the State of Florida, leaving a Last Will and Testament dated December 3, 1949 (R. 3). The Will named respondent, Elizabeth Donner Hanson, as Executrix and, after disposing of personal effects, divided her residuary estate into two parts (1) to Delaware Trust Company, trustee under a trust for the benefit of Katherine N. R. Denekla Ordway and (2) to Elizabeth Donner Hanson, trustee for the benefit of Dorothy B. Rodgers Stewart (R. 15). The Will was duly admitted to probate and the executrix qualified in Palm Beach County, Florida, on December 23, 1952 (R. 3).

Prior to the execution of the Will, Mrs. Donner had entered into a purported agreement of trust dated March 25, 1935, with Wilmington Trust Company as trustee (R.

21-29). The trust agreement provided that the trustee could act only with the written consent of the advisee of the trust and the trustor retained the right to nominate any additional advisers or change advisers during her lifetime. The trustor also retained other broad powers including the power to remove the trustee. The net result of the cumulative retained powers and the manner whereby the trust was administered was to create the relationship of principal and agent between the named so-called trustee and the so-called trustor (R. 127-156). The trustee was to pay the net income to the trustor during her lifetime and, upon the death of the trustor, to assign and deliver the trust fund unto such persons and in such manner and amounts as trustor should have appointed (1) by the last written instrument in writing executed by trustor and delivered to trustee or (2), failing any such appointment, by her Last Will and Testament (R. 22).

Mrs. Donner attempted to exercise the power of appointment contained in the trust agreement by executing and delivering to Wilmington Trust Company an instrument dated December 3, 1949, which was the date of the execution of the Will, directing the manner whereby the trust fund should be distributed. This instrument was amended in a minor respect on July 7, 1950 (R. 30-34, 35-37). The attempted appointment by the instrument of December 3, 1949, as amended on July 7, 1950,³ provided for a plan of distribution which, insofar as the same is material in this cause,⁴ directed the trustee, Wilmington Trust Company, to pay over the sum of \$400,000.00 to Delaware Trust Company under two separate trusts dated November 26, 1948, created by Elizabeth Donner Hanson for the benefit of

3. Other earlier attempts were made to exercise the power of appointment but were revoked by the December 3, 1949, appointment. Many of the parties named below were named because provisions had been made for them in early revoked powers of appointment (R. 38-44, 45-46).

4. Dispositions other than those material herein totaling \$17,000.00 were included.

Joseph Donner Winsor and Donner Hanson in equal amounts, and the remainder to the Executrix of Mrs. Donner's last Will and Testament; Mrs. Hanson.

The Will did not provide for the payment of said sum of \$400,000.00 and, accordingly, if said power of appointment was invalid, the entire \$400,000.00 would also have gone to the Executrix of Mrs. Donner's last Will and Testament, Mrs. Hanson. The dispute involved is whether the \$400,000.00 should have gone as directed by said power of appointment or should have gone under the Will (A. 5a, 6a).

After Mrs. Donner's death, a dispute arose with respect to what assets passed under Mrs. Donner's Will in the State of Florida. A declaratory judgment action was commenced January 22, 1954, in the Circuit Court for Palm Beach County, Florida, by Katherine N. R. Denckla and Elwyn L. Middleton, guardian of the property of Dorothy B. R. Stewart, against Wilmington Trust Company, Delaware Trust Company and against other parties. The other parties were direct and contingent beneficiaries under said purported power of appointment and under previous powers of appointment and also direct and contingent beneficiaries under the Will.⁵ Of the named Defendants, Elizabeth Donner Hanson, individually and as Executrix under the Last Will and Testament of Dora Browning Donner, and as guardian for Donner Hanson, Joseph Donner Winsor and William D. Roosevelt, appeared (R. 172). The Circuit Court held on January 14, 1955, that, as between the appearing parties the trust instrument and powers of appointment appurtenant thereto were invalid and that the trust fund passed under the residuary clause of the Will of Mrs. Donner (R. 83). Upon appeal to the Supreme Court of the State of Florida, the Supreme Court affirmed

5. One remote, contingent beneficiary under the purported power of appointment, Curtin Winsor, Jr., was not named. He was represented by his mother, who was guardian *ad litem* for the primary beneficiaries, and he was also represented as a member of a class.

the Circuit Court on September 19, 1956, as to the invalidity of the power of appointment and the purported trust agreement and reversed with respect to the jurisdiction of the Court over non-answering defendants (A. 20a).

Elizabeth Donner Hanson fearing that she as a Florida resident and domiciliary might in some way be unfairly treated by the Florida Courts, had filed a declaratory judgment action in the Court of Chancery in Delaware on August 2, 1954, praying that the Court determine the persons entitled to participate in the trust fund and powers of appointment exercised pursuant thereto. The parties in the Delaware action are almost identical with those named in the Florida Circuit Court with the exception that certain servants of Mrs. Donner and Curtin Winsor, Jr., were named as defendants who were not named in the Florida action.

Both corporate trustees, Wilmington Trust Company and Delaware Trust Company, Joseph Donner Winsor, Curtin Winsor, Jr., Donner Hanson, Dorothy B. R. Stewart, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla appeared in person or by guardian ad litem in the Delaware action. Your petitioners, together with Robert B. Walls, Jr., guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, comprised what the Delaware Supreme Court called the "Lewis group". The other individual defendants and the plaintiff were called the "Hanson group".

The Lewis group contends that the trust agreement is invalid and the exercise of the power of appointment was testamentary and ineffective to pass any interest, therefore, the entire trust fund should have passed under the Will of the decedent.

The Hanson group on the other hand maintains that the trust is valid and the transfer of the \$400,000.00 by the Wilmington Trust Company pursuant to the exercise of the power of appointment was sufficient to pass title. Adop-

tion of either group's contention would financially benefit the members of that group.

The Delaware Court of Chancery granted summary judgment in favor of the Hanson group on January 13, 1956, directly in the face of the prior Summary Final Decree of the Florida Circuit Court in favor of the Lewis group. On appeal the Delaware Supreme Court affirmed on February 7, 1957, and thus held for the Hanson group (A. 34a) even though the Florida Supreme Court previously had held for the Lewis group (A. 20a). Both Delaware courts refused to give full faith and credit to the Florida judgments.

REASONS FOR GRANTING THE WRIT.

The decision of the Delaware Supreme Court in the case below is directly in conflict with the decision of the Supreme Court of the State of Florida in *Hanson et al. v. Denckla et al.*, (A. 20a). This irreconcilable conflict between the Florida Supreme Court and the Supreme Court of the State of Delaware was recognized by the Delaware Court below when it characterized these cases as "a head-long jurisdictional collision between states" (A. 40a).

It has long been the policy of this Court to entertain writs of certiorari from a state court where there is a failure to give full faith and credit to a judgment of a sister state. *Roche v. McDonald*, 275 U. S. 449; *Adam v. Saenger*, 303 U. S. 59; *Milliken v. Meyer*, 311 U. S. 457; *Riley v. New York Trust Co.*, 315 U. S. 343.

The importance of this case can best be asserted by the simple statement that here the Delaware Courts said the Full Faith and Credit Clause is not binding (A. 59a).

The ultimate settlement of the main question presented here, what effect shall be given the Full Faith and Credit Clause to judgments of a sister state, would have a far reaching effect on all questions similar to the instant

ones. The situation created by the action of the Delaware Supreme Court would allow any number of different states to arrive at different decisions as to the validity of a single trust or will.

To your petitioners' knowledge, this Court has never passed upon the question involved in the instant case, i.e., whether the judgment of a Court of last resort of a decedent's domicile concerning assets which may or may not pass under the decedent's will or in the decedent's estate, and over which the Court has jurisdiction, must be given full faith and credit in a sister state where the personal property in question is physically located.

Your petitioners suggest that the Court below erred in refusing to give the judgment of the Florida Supreme Court the full faith and credit to which it was entitled. Contrary to the explicit holding of this Court in *Milliken v. Meyer, supra*, the Supreme Court of the State of Delaware, in passing upon the effect of the judgment of the Florida Supreme Court, held not only that the laws of Delaware and not those of Florida controlled the validity of the trust instrument, but that the Florida Supreme Court was in error on the merits! (A. 53a, 54a). A state court may never inquire into the logic or consistency of a decision of a sister state or the validity of the legal principles upon which the foreign judgment is based. *Milliken v. Meyer, supra*, *Fauntleroy v. Lum*, 210 U. S. 230.

Granting that the Delaware Court could inquire into the jurisdiction of the persons over which the Florida Court had control, *Baker v. Baker, Eccles, & Co.*, 242 U. S. 394, it could not hold that as between the appearing parties the Florida judgment was invalid. *Riley v. New York Trust Co., supra*. Both Delaware Courts held that the trust agreement was invalid both as to the parties which appeared in the Florida action and those who did not appear. No question was ever raised as to the jurisdiction over the persons who appeared in the Florida Court. The only holding was that since the action involved trust assets (personal

property) which were located in the State of Delaware and the corporate trustee was located in the State of Delaware, therefore, Delaware was the only Court with jurisdiction to pass upon the validity or invalidity of the trust (A. 42a). The Delaware Court held that since the trustees were non-appearing parties in the Florida action, the Florida Court had no jurisdiction to pass upon the trust validity, even though the Florida Supreme Court had held jurisdiction had been acquired over said trustees to adjudicate the questions involved (A. 52a-53a). As to the persons who appeared in the Florida action, there can be no doubt, but that they were and are personally bound by the decision of the Florida Supreme Court. However, the Delaware Supreme Court said "No"!

The Delaware Supreme Court actually reviewed and acted as an appellate court in dealing with the judgment of the Florida Supreme Court and in effect reversed it!

CONCLUSION.

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

• ARTHUR G. LOGAN;

LOGAN, MARVEL, BOGGS AND THEISEN,

400 Continental American Building,

Wilmington 1, Delaware,

Attorneys for Dora Stewart Lewis,

Mary Washington Stewart Borie

and Paula Browning Denckla,

Petitioners.

Appendix.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and
Trustee under the Last Will of Dora Browning
Donner, deceased,

Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corpora-
tion, as Trustee, et al.,

Defendants.

OPINION.

December 28, 1955

Action for declaratory judgment. Upon cross-motions
for summary judgment.

WILLIAM H. FOULK, of Wilmington, for the plain-
tiff Elizabeth Donner Hanson, Executrix and
Trustee

CALEB S. LAYTON (of Richards, Layton & Finger)
of Wilmington, for the defendant Wilmington
Trust Company, Trustee

EDWIN D. STEEL, Jr. (of Morris, Steel, Nichols &
Arsht) of Wilmington, Guardian Ad Litem
for the defendants, Joseph Donner Winsor,
Curtin Winsor, Jr. and Donner Hanson

JOSIAH MARVEL, ARTHUR G. LOGAN and AUBREY B. LANK of Logan, Marvel, Boggs and Theisen) of Wilmington, for the defendants; Dora Stewart Lewis, Mary Washington Stewart Berie and Paula Browning Denckla

ROBERT B. WALLS, Jr., of Wilmington, Guardian Ad Litem for the defendants, Dorothy B. R. Stewart and William Donner Denckla

DAVID F. ANDERSON (of Berl, Potter and Anderson) of Wilmington, for the defendant Delaware Trust Company, Trustee

HERRMANN, *Acting Vice Chancellor*:

The Court is called upon to decide (1) whether the doctrine of collateral estoppel precludes the parties from litigating in this action the issue of the validity of a certain written agreement as an *inter vivos* trust agreement; and, if not, (2) whether the trust and the exercises of the power of appointment thereunder are valid or invalid.

This action for declaratory judgment was brought by Elizabeth Donner Hanson, Executrix and Trustee under the Will of Dora Browning Donner, to determine the persons entitled to assets valued at \$417,000. The assets were held at the time of the death of Mrs. Donner by the defendant Wilmington Trust Company under an Agreement entered into by them in 1935. After Mrs. Donner's death, the assets were distributed by Wilmington Trust Company to certain recipients named in Instruments executed by Mrs. Donner in 1949 and 1950 in the exercise of the power of appointment reserved to her under the Agreement of 1935.

The case is before the Court upon four motions for summary judgment. Three of the motions are based upon the contention that the Agreement of 1935 created a valid trust, that the power of appointment thereunder was validly exercised in 1949 and 1950, and that the distributions

by Wilmington Trust Company pursuant thereto were properly made in discharge of its duty as Trustee under the Agreement. This is the position taken in the motions for summary judgment filed by the plaintiff, by Wilmington Trust Company, Trustee, and Edwin D. Steel, Jr., Guardian Ad Litem for three minor defendants, Joseph Donner Winsor, Gurtin Winsor, Jr. and Donner Hanson, grandchildren of Mrs. Donner. Opposed to this position is the cross-motion for summary judgment filed by the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla, other grandchildren of Mrs. Donner. These defendants contend that by application of the doctrine of *res judicata* or collateral estoppel, or by reason of applicable principles of law, this Court must conclude that the Agreement of 1935 was an agency agreement and not a trust agreement; that, therefore, the Instruments of 1949 and 1950 were invalid testamentary acts and the transfer of assets by Wilmington Trust Company thereunder was erroneous because such assets should have been distributed under the Will of Mrs. Donner. These defendants cross-claim and seek a judgment against Wilmington Trust Company in the amount of \$417,000. The defendant Delaware Trust Company, Trustee, supports the motions of the proponents of the Trust. Robert B. Walls, Jr., Guardian Ad Litem for the defendants Dorothy B. R. Stewart and William Donner Denekla, incompetent daughter and minor grandson of Mrs. Donner, supports the motion of the opponents of the Trust. The pending motions are based upon the pleadings and exhibits thereto, affidavits, depositions and certified copies of the Florida proceedings hereinafter discussed.

There does not appear to be any genuine issue as to any of the following facts:

1. The plaintiff has been barred from proceeding further herein by an injunction issued to her by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, pursuant to the decree of that Court hereinafter discussed.

Under the Agreement with Wilmington Trust Company, dated March 25, 1935, Mrs. Donner transferred to it certain designated securities. The Agreement provided that Wilmington Trust Company, as Trustee, should pay the net income of the trust fund to Mrs. Donner for life and, upon her death, should transfer the trust fund, free from the trust, "unto such person or persons * * * as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee."

Thereafter, Mrs. Donner executed and delivered to Wilmington Trust Company an Instrument, dated December 3, 1949, in which, after revoking earlier Instruments by which she purportedly had exercised her power of appointment, she again purported to exercise the power of appointment by directing that, upon her death, the Trustee should transfer the trust fund as follows: (1) \$4,000 to three named individuals; (2) \$1,000 to each of certain servants; (3) \$10,000 to Louisville Trust Company in trust for Benedict H. Hanson, a son-in-law of Mrs. Donner; (4) \$10,000 to the Bryn Mawr Hospital; (5) \$200,000 to the Delaware Trust Company in trust for Joseph Donner Winsor; (6) \$200,000 to the Delaware Trust Company in trust for Donner Hanson; and (7) the residue to the Executrix under Mrs. Donner's Will to be dealt with as stated therein. Mrs. Donner thereafter executed and delivered to Wilmington Trust Company an Instrument, dated July 7, 1950, which purported to partially revoke the Instrument of December 3, 1949 by deleting therefrom the provision for \$10,000 to the Louisville Trust Company, Trustee. In all other respects, the Instrument of 1950 confirmed the Instrument of 1949.

At the time of the execution of the Agreement of 1935, Mrs. Donner was a resident of Pennsylvania. The securities referred to in the Agreement were delivered to Wilmington Trust Company in Delaware and they remained in Delaware in the possession of and under the administration of

the Trust Company. Wilmington Trust Company has no place of business and transacts no business outside of Delaware.

When Mrs. Donner died in 1952, she was a resident of Palm Beach County, Florida, and had been such since 1944. The Will of Mrs. Donner, dated December 3, 1949, was probated there and the plaintiff herein, Elizabeth Donner Hanson, duly qualified as Executrix under the Will. After bequeathing her personal and household effects to Mrs. Hanson and Dora Donner Ide, two of her daughters, Mrs. Donner made the following disposition of the residue of her property "including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix":

(1) Payment of all death taxes on property appointed by Mrs. Donner under the 1935 Agreement; and (2) the balance to be divided into two equal parts: (a) one part to Delaware Trust Company in trust for Katherine N. R. Denckla, another daughter; and (b) the other part to Mrs. Hanson in trust for Dorothy B. Rodgers Stewart, another daughter, during her lifetime and after her death to Delaware Trust Company in trust for Mrs. Denckla.

When Mrs. Donner died, the securities and cash held by Wilmington Trust Company under the 1935 Agreement amounted to \$1,493,629.91. Thereafter, Wilmington Trust Company distributed cash and securities aggregating \$417,000 in accordance with the provisions of the Instruments of 1949 and 1950 and deposited the balance to the account of Mrs. Hanson as Executrix and Trustee under the Will of Mrs. Donner. None of the trust funds distributed to Delaware Trust Company, Trustee, have ever been held or administered outside of Delaware.

In January 1954, Mrs. Denckla and Elwin L. Middleton, guardian of the property of Mrs. Stewart, brought an action in the Circuit Court of Palm Beach County, Florida, against Mrs. Hanson, individually and as Executrix of Mrs.

Donner's Will, Wilmington Trust Company, Delaware Trust Company and others who, were interested in the assets, directly or beneficially, by reason of appointment or the residuary clause of the Will: The Florida action sought a declaratory judgment determining what passed under the Will and the authority of the Executrix over the assets held by Wilmington Trust Company under the 1935 Agreement. Neither Wilmington Trust Company, Delaware Trust Company nor any of the other appointees under the Instrument of 1949, named defendants in the action, were served personally and they did not appear in the action. None of the assets held by Wilmington Trust Company under the Agreement of 1935 have ever been held or administered in Florida. On January 14, 1955, a "summary final decree" was entered by the Florida Court holding (1) that the Court lacked jurisdiction over the assets in Delaware and over Wilmington Trust Company, Delaware Trust Company, and the other non-answering defendants and that the complaint be dismissed without prejudice as to all such defendants; and (2) that no present interest passed to any beneficiary other than Mrs. Donner under the Agreement of 1935 and the Instrument of 1949 and that the Instrument was testamentary in character and invalid as a testamentary disposition because it was not subscribed by two witnesses as required by Florida law; and (3) that, therefore, as to the parties before the Florida Court, the assets held by Wilmington Trust Company under the Agreement of 1935 passed under the residuary clause of Mrs. Donner's Will.

In the meanwhile, in July 1954, the instant action was begun by Mrs. Hanson as Executrix and Trustee under Mrs. Donner's Will. Named herein as defendants are Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the appointees named in the Instruments of Appointment executed by Mrs. Donner, residuary legatees under Mrs. Donner's Will and others having beneficial interests. The complaint herein alleges that it was filed be-

cause of the desire of the Executrix to settle the matters in controversy finally and conclusively "as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee." The complaint alleges that no part of the assets involved were located in Florida and that Wilmington Trust Company, Delaware Trust Company and certain other indispensable parties were not before the Florida Court; that, therefore, that Court could not render "an effective and binding decree." The prayer of the complaint in this action is that this Court determine by declaratory judgment the persons who, at the time of Mrs. Donner's death, were entitled to participate in the assets held in trust by Wilmington Trust Company under the 1935 Agreement.

I. COLLATERAL ESTOPPEL

The first question to be decided is whether by reason of the Florida decree, the parties hereto are precluded from litigating in this action the issue of the validity of the Agreement of 1935 as a trust agreement. This is the ultimate question because the validity of the exercises of the power of appointment depends, in this case, upon the validity of the basic Agreement. See *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al.*, 26 Del. Ch. 397, 24 A. (2d) 309, 312.

The opponents of the Trust assert the doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata* is not applicable because the Florida action and this action involve different causes of action. The refinement of the *res judicata* doctrine known as the doctrine of collateral estoppel may be applicable, however, the difference in causes of action notwithstanding. See *Niles v. Niles*, — Del. Ch. —, 111 A. (2d) 697; *Petrucci v. Landon*, — Terry —, 107 A. (2d) 236; *Scott*, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1. The question, then, is whether the doctrine of collateral estoppel may be invoked as an affirmative defense by the opponents of the Trust to pre-

clude the other parties from obtaining a determination by the courts of this State as to the validity of the Trust. I am of the opinion that this question must be answered in the negative.

The Florida Court made determinations incidentally that it would not have had the jurisdiction to make directly. The action before the Florida Court was brought to determine what passed under the residuary clause of the Will of Mrs. Donner, a Florida domiciliary. As necessary but incidental determinations in that action, the Florida Court concluded that the Agreement of 1935 was invalid as a trust agreement and that, therefore, the exercise of the power of appointment in 1949 was testamentary.²

In a direct proceeding, the Florida Court would not have had the jurisdiction to determine the essential validity of an *inter vivos* trust created in Delaware, all of the assets of which were in Delaware and the Trustee of which is a Delaware corporation which was not before the Court. Since neither the Trust *res* nor the Trustee were within the jurisdiction of the Florida Court, it is clear that that Court could not have determined the essential validity of the purported Trust in a direct proceeding brought for the purpose. 45 Am. Jur. "Trusts" §§ 564, 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809; compare *In re Harriman's Estate*, 124 Misc. Rep. 320, 208 N. Y. S. 672; *Harvey, et al. v. Fiduciary Trust Co., et al.*, 299 Mass. 457, 13 N. E. (2d) 299; *Land*, "Trusts in the Conflict of Laws", Secs. 41, 43.

The principle is settled that where a court has incidentally determined a matter which it would have had no jurisdiction to determine directly, the judgment is not conclusive in a subsequent action brought to determine directly

2. The decree of the Florida Court contained no expressed conclusion regarding the invalidity of the Agreement of 1935 as an agreement of trust. Since, however, such determination must have been made before the Court could reach the expressed conclusion that the exercise of the power was testamentary, the prerequisite determination as to the invalidity of the Agreement must be said to be implicit in the decree.

such incidental matter. In his important and widely quoted discussion of *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 18, Professor A. W. Scott states:

"* * *. It may happen, however, that the court has jurisdiction to determine the cause of action, but that in determining it the court must necessarily decide a question which it would have no jurisdiction to determine in an action brought expressly for its determination. In such a case the judgment of the court is valid, and the cause of action will be extinguished, the judgment operating by way of merger or bar. The question then arises as to the effect by way of collateral estoppel of the determination of the particular matter on which the judgment was based. Although the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it. It seems clear, also, that after such determination in a subsequent suit, it is the determination of the court in that suit, and not the incidental determination in the prior suit, which is conclusive between the parties."

See also *Restatement of Judgments*, § 71; *Petrucchi v. Landon*, *supra*; dissent of Rutledge, J. in *Geracy v. Hoover*, 77 U. S. App. D. C. 55, 133 F. (2d) 25, 147 A. L. R. 185.

In the final analysis, the question becomes one of public policy. At 56 Harv. L. Rev. 1, 22, Professor Scott states:

"The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter directly be permitted to determine it incidentally, not merely for the purpose of deciding the controversy which it can

properly decide, but also with the effect of precluding the parties from litigating the question in those courts which alone are entrusted with jurisdiction to determine it directly?"

This eminent authority on the subject concludes with the admonition that the application of the doctrine of collateral estoppel must always be based upon a sound public policy and that care "must be exercised in its application to see that it works no injustice."

It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inters vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust.

Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the "home" of the Trust is in Delaware and its validity must be determined by the law of Delaware. *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al., supra; Wilmington Trust Company v. Sloane*, 30 Del. Ch. 103, 54 A. (2d) 544. This is a case of first impression in this State as to an important phase of the question of the validity of the Trust. The law of this State must be formulated here. It would be contrary to public policy for the Courts of this State to relinquish their duty of enunciating the law controlling a trust having its situs in Delaware and to thereby relegate the Trustee and the Trust *res* here involved to the law prevailing in another jurisdiction. Compare *Taylor, et al. v. Croson, et al.*, 11 Del. Ch. 445, 98 A. 375.

Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercises of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See *Restatement of Judgments*, § 70 and *com. f*, 1948 Supp.; *Scott "Collateral Estoppel by Judgment"*, 56 Harv. L. Rev. 1, 10.

The opponents of the Trust place principal reliance upon *Niles v. Niles, supra*. That case is not applicable because there the issue previously determined incidentally by the New York Court also arose incidentally before the Chancellor. I do not consider anything stated herein to be in conflict with the decision in the *Niles* case. The other cases cited by the opponents of the Trust have been examined and have been found to be inapposite. See *Slater v. Slater*, 372 Pa. 519, 94 A. (2d) 750; *Ugust v. LaFontaine*, 189 Md. 227, 55 A. (2d) 705; *United States v. Silliman* (C. C. A. 3) 167 F. (2d) 607; *William Whitman Co. v. Universal Oil Products Co.* (D. Del.) 92 F. Supp. 885; *United States v. Moser*, 274 U. S. 225, 47 S. Ct. 616.

It is concluded that no determination made in the Florida action is conclusive in this action as to the validity of the Agreement of 1935 as a trust agreement. The parties herein will not be precluded by the defense of collateral

estoppel from obtaining the decision of this Court upon that issue.

II. ESSENTIAL VALIDITY OF THE TRUST AGREEMENT

In order to determine the essential validity of the Agreement of 1935 as a trust agreement, it is necessary to consider its pertinent provisions in some detail.

The Agreement was a formal document, executed by Mrs. Donner and Wilmington Trust Company, in which Mrs. Donner was referred to as Trustor and Wilmington Trust Company was referred to as Trustee. It was recited that the Trustor "desires to establish a trust of certain securities and property" referred to as the "trust fund". It was stated that the Trustor thereby "assigned, transferred and delivered" certain listed securities and property to the Trustee in trust to "hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout". The Agreement provided for the payment of the net income of the trust fund to the Trustor during her lifetime and, upon her death, the Trustee was directed to convey the fund "free from this trust, unto such person or person and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee"; or in the absence of such instrument, "by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita". In default of exercise of the power of appointment and living issue, the fund was to go to the Trustor's next of kin. The Agreement then conferred upon the Trustee all of the ordinary general and broad powers usually conferred upon a Trustee, including the power to retain any and all stocks and securities, to sell and exchange the same, to invest the proceeds of any

sales, to vote stock, to participate in reorganizations, to determine whether expenses and other disbursements shall be charged against income or principal, and to hold bearer securities in its own name or in the name of its nominees. It was provided, however, that the Trustee shall exercise its power to sell or exchange trust property, to invest the proceeds of any such sale or other available money and to participate in plans of reorganization, merger, etc., only upon the written direction of, or with the written consent of the Adviser of the trust; provided that if there should be no Adviser, or if the Adviser should fail to act within a ten day period, the Trustee might exercise all such powers and "take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of this trust". The Trustor named as Adviser her husband or "such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime". The Trustor reserved the right to amend or revoke the Trust Agreement in whole or in part and, further, she reserved the right to change the Trustee.

Thus, by the Agreement of 1935, Mrs. Donner reserved to herself the following significant rights and powers: (1) the right to all of the net income for life; (2) the right to amend or revoke the Agreement in whole or in part; (3) the right to change the Trustee; (4) the right to name and change an investment Adviser. The question here presented revolves about those reservations. The opponents of the Trust contend that the cumulation of the reservations created an agency relationship between Mrs. Donner and the Wilmington Trust Company and not a trust relationship; that, therefore, the disposition, insofar as it was intended to take effect after Mrs. Donner's death, was testamentary and invalid for failure to comply with the Florida law relating to the validity of Wills.

It is my opinion that under the law of this State, which governs the essential validity of the Agreement of

1935 as a trust agreement, the reservations of rights and powers made therein by Mrs. Donner did not defeat the *inter vivos* trust she so clearly intended to create by that Instrument.

The law seems settled as to the first three reservations here involved. *Equitable Trust Co. v. Paschall, et al.*, 13 Del. Ch. 87, 115 A. 356, stands for the proposition that the reservation of a life interest plus the reservation of the power to revoke an *inter vivos* trust does not invalidate the trust. See also *1 Scott on Trusts*, § 57.1; *Restatement of Trusts*, § 57; *1 Bogert, Trusts and Trustees*, p. 483; *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N. E. (2d) 238. Furthermore, the power of the settlor of an *inter vivos* trust to change the trustee has judicial sanction in this State. See *Wilmington Trust Co., et al. v. Wilmington Trust Co., et al.*, *supra*.

The brunt of the attack on the Agreement of 1935 is centered upon its provisions for the appointment of an investment Adviser and the requirement that the Trustee be governed by the Adviser as to (1) any sale or exchange of trust property; (2) any investment of the proceeds of such sale or of other available money; and (3) any participation in plans of reorganization, merger, etc., of any company in which the Trustee might hold securities. It appears that the effect of such provisions upon the validity of an *inter vivos* trust has not been directly decided in this State.

It seems to be settled that an intended *inter vivos* trust does not become testamentary because the trustor reserves the power to direct the trustee as to the making of investments. See *Restatement of Trusts*, § 57(2) and comment thereon; *1 Scott on Trusts*, § 57.2; *1 Bogert, Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. (2d) 113, 125. If the trustor may personally direct or veto investments by the trustee without impairing the validity of an *inter vivos* trust, it would seem to follow that the trustor may assign

that authority to a third party, called "adviser", without destroying the validity of the trust. Such investment counselor has been considered to be a fiduciary, a co-trustee or a quasi-trustee. See *Gathright's Trustee v. Gaut*, 276 Ky. 562, 124 S. W. (2d) 782 and *Annotation* 120 A. L. R. 1407; *Restatement of Trusts*, § 185; *Scott on Trusts*, § 185; 1 *Bogert, Trusts and Trustees*, p. 536. In *Equitable Trust Co. v. Union National Bank*, 25 Del. Ch. 281, 18 A. (2d) 288, this Court found it unnecessary to determine whether or not an investment adviser was a fiduciary. Whatever the precise relationship between the Trustor and the Adviser or the Trustee and the Adviser may be called, I think it is clear that if Mrs. Donner might have reserved to herself the power to specify investments and to direct or veto the Trustee as to investment policy, without impairing the validity of the *inter vivos* Trust, she may properly delegate that power to another without destroying the *inter vivos* Trust she so clearly intended to create.

The intent of the Trustor is a critical and controlling factor in determining whether an agency or a trust was created by the Agreement of 1935. See 1 *Scott on Trusts* (1954 Supp.) § 57.2, p. 74. It is beyond question, I think, that it was Mrs. Donner's intent that the 1935 Agreement should create an *inter vivos* trust. In the document, she called herself "Trustor", she called Wilmington Trust Company "Trustee" and she referred to the "trust fund" she was thereby conveying to the Trustee:

It appears that there is no established limit to the nature or extent of the powers which the settlor of a valid *inter vivos* trust may reserve so long as the settlor does not reserve the right to control the trustee as to the details of the administration of the trust. If, however, the settlor reserves such power to control the trustee as to the details of the administration of the trust as to make the trustee a mere agent of the settlor, the disposition may be testamentary so far as it is intended to take effect after the

settlor's death. See *Restatement of Trusts*, § 57(2); 1 *Bogert, Trusts and Trustees*, § 104, p. 490.

In the Agreement of 1935, Mrs. Donner did not reserve to herself control over the details of the administration of the Trust as would constitute the Trustee an agent under the principle above stated. In the Agreement, she conveyed title and broad powers to the Trustee limited only by the obligation of the Trustee to consult and follow the advice of the investment counselor. The opponents of the Trust contend, however, that an examination of the actual operation of the Trust Fund, as disclosed by affidavits and depositions, reveals that the Trustee permitted the Adviser to usurp all of its powers and functions as to the details of administration and that, in reality, the Trustee was nothing more than a custodian of the securities.

Under the circumstances of this case, the *modus operandi* adopted by the Trustee and the Adviser is immaterial to the question of whether the Agreement of 1935 created a relationship of trust or of agency. In the absence of ambiguity, fraud, duress or mistake, the intent of the Trustor and the nature of the relationship created by the Agreement of 1935 is to be determined from the face of the Instrument itself. See *Restatement of Trusts*, § 38(2); Comment a. There is no showing that Mrs. Donner knew of the facts relied upon by those who assert an agency instead of a trust, nor is there any showing that she was in any way responsible for any surrender of function which may have taken place as between the Trustee and the Adviser in the operation of the trust. Even if we disregard its vigorous denials and assume that the Trustee abandoned its powers and duties to the Adviser, as asserted by the opponents of the Trust, such situation would not convert a trust agreement into an agency agreement in the absence of the knowledge or consent of Mrs. Donner. A trustor, intending to create an *inter vivos* trust, may not be thwarted by an *ex parte* act or failure to act on the part of the trustee.

It is manifest upon the face of the Agreement that an *inter vivos* trust was intended. Effect will be given to the Agreement in accordance with its plain terms so that the clear intent of the Trustor will not be defeated.

The opponents of the Trust place principal reliance upon *Restatement of Trusts*, § 56; *In re Pengelly's Estate*, 374 Pa. 358, 97 A. (2d) 844; *Frederick's Appeal*, 52 Pa. 338; and *Hurley's Estate*, 16 Pa. D. & C. 521. In *Restatement of Trusts*, § 56, it is stated that if no interest passes to the beneficiaries before the death of the settlor, the intended trust is testamentary. That principle is not applicable in the instant case because present interests were created at the time of the execution and delivery of the Agreement of 1935 and the exercises of the power of appointment thereunder. The Agreement provided for an ultimate disposition of the assets to "then living issue of Trustor", subject to defeasance by revocation or exercise of the power of appointment. Present interests were thus created when the Agreement and exercises thereunder were executed, even though such interests could not fall into possession until after the death of Mrs. Donner and even though such interests might be ultimately defeated by further exercise of the power of appointment or by revocation. See 1 *Bogert, Trusts and Trustees*, pp. 481-483; *Restatement of Property*, § 157, Comments P, Q and R; *Gray on Perpetuities*, § 112; *Simes, Future Interests*, § 80; *Leahy v. Old Colony Trust Co.*, *supra*. Since present interests passed under the Agreement and the exercises of the power of appointment and only the enjoyment thereof was postponed until the Settlor's death, the *inter vivos* trust here is not defeated by application of the principle stated in § 56 of the *Restatement of Trusts*. See *Brown v. Pennsylvania Company*, 2 W. W. Harr. 525, 126 A. 715; *Security Trust & Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 A. 385; *Wilmington Trust Co. et al. v. Wilmington Trust Co., et al.*, *supra*; *Restatement of Trusts*, § 57(1); 1 *Scott on Trusts*, § 57.1.

The case of *In re Pengelly's Estate, supra*, does not aid the opponents of the Trust because that case is distinguishable on its facts. There it was found by the Court that the trust instrument merely continued a previously existing agency relationship and the Settlor had reserved complete power to control the Trustee in the administration of the trust. Moreover, the Court in the cited case was concerned with the public policy requiring protection of the rights of widows. The cases of *Frederick's Appeal, supra*, and *Hurley's Estate, supra*, are likewise clearly distinguishable on their facts and of no assistance.

It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the Instruments of 1949 and 1950 were valid. *Wilmington Trust Co., et al., v. Wilmington Trust Co., et al., supra*. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its Agreement with Mrs. Donner.

The motions for summary judgment filed by the Lewis defendants will be denied. The other motions for summary judgment filed herein will be granted.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CIVIL ACTION No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, de-
ceased,

Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee, et al.,

Defendants:

ORDER.

AND NOW, To Wit: this 25 day of January, A.D. 1956,
the Motion of Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning Denckla, For New Trial
pursuant to Rule 59 of the Rules of the Court of Chancery
of the State of Delaware, filed herein on January 20, 1956,
having come on to be heard, It Is

ORDERED, ADJUDGED and DECREED that the said Motion
For New Trial filed herein by Dora Stewart Lewis, Mary
Washington Stewart Borie and Paula Browning Denckla,
be and the same hereby is denied.

/s/ D. L. HERRMANN,

Judge.

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1956

SPECIAL DIVISION A.

ELIZABETH DONNER HANSON, Individually
and as Executrix, et al.,*Appellants,*

v.

KATHERINE N. R. DENCKLA, Individually
et al.,*Appellees.*

Case No. 27,622.

OPINION.

Opinion filed September 19, 1956.

An Appeal from the Circuit Court for Palm Beach County,
C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

HOBSON, J.:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-

assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949, (the same day she executed her will, and while domiciled in Florida) Mrs. Donner executed

an instrument entitled "DONNER * FIRST POWER OF APPOINTMENT" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "DONNER * SECOND POWER OF APPOINTMENT" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

"FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix*, I direct my Executrix to deal with as follows, namely:" [Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Emphasis supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

"Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character

and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor

below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, where the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the documents of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition, for she revoked all previous exercises of the

power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

It is urged upon us that the remaindermen possessed during the life of the settlor a present right of (sic) future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

" . . . since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement*. Therefore, the trust agreement and appointments thereunder must always be construed together." (Emphasis supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; *Id.*, 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be

domiciled after the trust was executed, and it is unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher*, *supra*, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted ~~inter vivos~~ trust such as this is a ~~matter of first impression~~ in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life. The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

"(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

"(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

* * *

"(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "advisor" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

"Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

"Where the owner of property purports to create a trust inter vivos but no interest passes to the bene-

ficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

"8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process.

These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

TERRELL, Acting Chief Justice, THORNAL and O'CONNELL,
JJ., concur.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above attached and twelve foregoing pages is a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida in that certain cause recently pending in said Court wherein Elizabeth Donner Hanson, individually and as executrix, et al., were appellants, and Katherine N. R. Denckla, individually, et al., were appellees, which was filed in said Court on September 19th, 1956, all as the same appears among the records and files of my said office. This Opinion and Judgment will not become final until after fifteen days from the date of filing said Opinion as aforesaid and if a petition for rehearing is filed within said fifteen-day period it will not become final until the petition for rehearing is acted on and disposed of. .

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 21st day of September, A. D. 1956.

GUYTE P. McCORD,
*Clerk of the Supreme Court
of Florida.*

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1956.

Wednesday, November 28, 1956.

ELIZABETH DONNER HANSON, INDIVIDUALLY AND AS
EXECUTRIX, ET AL.,

Appellants,

v.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, ET AL.,

Appellees.

ORDER.

The petition for rehearing filed by the appellants in the above cause has been considered and said petition is denied.

A True Copy

Test:

/s/ GUYTE P. McCORD,

Clerk Supreme Court. (Seal)

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 8, 1936.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935,

Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948,

Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,

Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla,

Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. STEWART, a mentally ill person,

Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

Defendant Below, Appellee,

BRUN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner,

Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Defendant Below, Appellee,

OPINION.

(January 14, 1957)

WOLCOTT and BRAMHALL, *Justices*, and CAREY, *Judge*, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Laak, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

WOLCOTT, J.:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson¹ as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to \$417,000 which was distributed by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the \$417,000, Delaware Trust Company, trustee, the recipient of \$400,000 of the trust assets, the recipients of the balance of \$17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust corpus comprises part of the Florida estate of the settlor and passes under her will.

1. Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of \$417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the \$417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew \$75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,² by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of \$17,000 to Bryn Mawr Hospital and certain family retainers, \$200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, \$200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denekla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denekla.

2. Later amended in a minor aspect.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of \$1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of \$417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner³ brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.⁴ In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree⁵ holding that it lacked jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any

3. Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

4. Some of the family retainers, the recipients of a total of \$3,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

5. The Florida decree was entered after the instituting of suit in Delaware by the executrix.

beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts, Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation* 89 A. L. R. 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, § 23; 1A *Bogert, Trusts and Trustees*, § 211, p. 327; *Restatement, Conflict of Laws*, § 294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the

situs of the trust created by the agreement of 1935 is Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an *inter vivos* trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, § 24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, § 330.4; 1 *Bogert on Trusts and Trustees*, § 103; and *Restatement, Trusts*, § 56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directly by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the

corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.), § 112(3); *Restatement, Property, Future Interests*, § 157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*, these interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent

of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her reserved power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revocable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR(2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment, will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*.⁶

6. This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn. v. Garrett*, (1946, D. C. Ark.) 64 F. Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N. W. 2d 458; *Cleveland Tr. Co. v.*

However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that limitation would not have made the trust testamentary in character. *Restatement of Trusts*, § 57, Comment g; 1 *Scott on Trusts*, § 57.2; 1 *Bogert on Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation, could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds

White, 134 Ohio State 1, 15 N. E. 2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N. Y. S. 835; *Strause v. First Nat'l Bank of Ky.*, (Ky.) 245 S. W. 2d 914, 32 ALR 2d 125; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N. E. 2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N. Y. S. 267; *Farkas v. Williams*, 5 Ill. 2d 417, 125 N. E. 2d 600; See 1 *Scott on Trusts*, § 57.1.

having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S. W. 2d 782; *Restatement of Trusts*, § 185, Comment c; 2 *Scott on Trusts*, § 185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, § 38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions

are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directors of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

• We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported *inter vivos* trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continu-

ance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed

out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment⁷ is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),⁸ the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the \$400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of \$417,000 with interest.

With respect to ~~the second~~ prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of \$17,000, since Delaware Trust Company has never received this sum.

7. By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

8. The recipients of \$3,000 of the \$17,000 appointment were not even named as parties *pro forma* in the Florida action.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527; 25 A. 2d 383, cert. den. 317 U. S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, § 429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U. S. 343, 62 S. Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 37 S. Ct. 152.

The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus, i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so

that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the 417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; aff. 107 N. J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting

against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore that the Florida judgment is not entitled to full faith and credit as a judgment *in rem*, as to the \$17,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments*, § 48; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was

testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucci v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not subject to Florida process. 54 *Am. Jur., Trusts*, § 564, § 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first

action. *Restatement, Judgments*, § 71; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1, 22; *Annotation*, 147 A. L. R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best by limiting parties to one trial of one issue. See *Niles v. Niles*, *supra*.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res* before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 S. Ct. 565.

The Lewis Group argues, however that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the

Florida court.⁹ The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N. Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts.*, § 584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

9. No similar argument is made with respect to the recipients of the \$17,000 appointment.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

.v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,

Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner, dated March 25, 1935, et al.,

Defendants Below, Appellees.

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531.

ORDER.

AND NOW, TO WIT: this 7th day of February, A. D. 1957, the petition of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for re-argument having come on to be heard, and the same having been duly considered, it is

ORDERED, ADJUDGED and DECREED:

That the same be and hereby is denied, and it is

FURTHER ORDERED, ADJUDGED and DECREED:

That the mandate of this Court shall be stayed for a period of ninety (90) days from the date hereof to permit the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to apply to the Supreme

Court of the United States for a writ of certiorari, and, if such application be made within said period, the mandate of this Court shall be stayed until the final order of the Supreme Court of the United States.

DANIEL F. WOLCOTT,

Justice.

HOWARD M. BRAMHALL,

Justice.

JAMES B. CAREY,

Judge.

APPROVED AS TO FORM:

EDWIN D. STEEL, JR.,

DuPont Building

Wilmington, Delaware

Guardian ad litem for Joseph

Donner Winsor, Curtin Winsor,

Jr., and Donner Hanson;

C. S. LAYTON,

DuPont Building

Wilmington, Delaware

Attorney for Wilmington Trust

Co., Trustee;

R. B. WALLS, JR.

Industrial Trust Building

Wilmington, Delaware

Guardian ad litem for Dorothy

B. R. Stewart, et al.;

DAVID F. ANDERSON

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Continental American Building

Wilmington, Delaware

Attorney for Dora Stewart

Lewis, et al.